Supreme Court, U. S.
FILED
NOV. 15 1979
MICHAEL RODAK, JR., CLERK

No. 79-389

In the Supreme Court of the United States

OCTOBER TERM, 1979

PAUL STOUT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

ROBERT E. LINDSAY
JAMES F. MILLER
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

Page

Opinions below 1

Jurisdiction 1

Questions presented 2

Statement 2

Argument 3

Conclusion 11

CITATIONS

Cases:

Garner v. *United States*, 424 U.S. 648 ..... 3, 5

Griffin v. *California*, 380 U.S. 609 4

Hoffman v. *United States*, 341 U.S. 479 4

Newhouse v. *Misterly*, 415 F. 2d 514, cert. denied, 397 U.S. 966 4

Reagan v. *United States*, 157 U.S. 301 10

Singer v. *United States*, 326 F. 2d 132 6

United States v. *Benson*, 592 F. 2d 257 5

United States v. *Berrios*, 501 F. 2d 1207 10

United States v. *Bertolini*, 576 F. 2d 1133 6

United States v. *Crovedi*, 467 F. 2d 1032, cert. denied, 410 U.S. 990 10

United States v. *Falk*, 479 F. 2d 616 10

United States v. *Farris*, 517 F. 2d 226 cert. denied, 423 U.S. 892 9

Page

Cases—(Continued):

United States v. *Genser*, 582 F. 2d 292 after remand, 595 F. 2d 146, aff'd after remand, 602 F. 2d 69, cert. denied, No. 79-249 (Oct. 29, 1979) 7

United States v. *Gomez-Rojas*, 507 F. 2d 1213, cert. denied, 423 U.S. 826 4

United States v. *Hicks*, 420 F. 2d 814 6

United States, *In re*, 584 F. 2d 666 7

United States v. *Kahl*, 583 F. 2d 1351 10

United States v. *Kopel*, 552 F. 2d 1265, cert. denied, 434 U.S. 970 4

United States v. *LaSalle National Bank*, 437 U.S. 298 8

United States v. *Malinowski*, 472 F. 2d 850, cert. denied, 411 U.S. 970 10

United States v. *McCabe*, 416 F. 2d 957 9

United States v. *Miller*, 425 U.S. 435 7

United States v. *Miller*, 529 F. 2d 1125, cert. denied, 426 U.S. 924 9

United States v. *Scott*, 521 F. 2d 1188, cert. denied, 424 U.S. 955 10-11

United States v. *Swanson*, 509 F. 2d 1205 10

United States v. *Taylor*, 569 F. 2d 448, cert. denied, 435 U.S. 952 6

United States v. *Young*, 578 F. 2d 216 5-6

Page

Constitution, statutes and rules:

Constitution, statutes and rules:

United States Constitution:

First Amendment 10

Fifth Amendment 2, 3, 4, 5

Sixth Amendment 5

Internal Revenue Code of 1954:

26 U.S.C. 7205 2

26 U.S.C. 7302 2

Fed. R. Crim. P.:

Rule 16(a)(1)(C) 8

Rule 52(b) 4, 6

Fed. R. Evid.:

Rule 404(b) 9

Rule 615 7

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-389

PAUL STOUT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not issue a written opinion. The opinion of the court of appeals (Pet. App. 1-8) is reported at 601 F. 2d 325.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 1979 (Pet. 2), and the court of appeals denied rehearing on August 10, 1979 (Pet. App. 9-10). The petition for a writ of certiorari was filed on September 7, 1979.

QUESTIONS PRESENTED

1. Whether the prosecution's introduction of Forms 1040 that petitioner filed for 1973, 1974 and 1975, violated his Fifth Amendment privilege against compulsory self-incrimination.

2. Whether either the Internal Revenue Service's investigation of petitioner's tax liability or petitioner's trial violated petitioner's rights to due process.

3. Whether petitioner was subject to improper selective prosecution.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of failing to file federal income tax returns for 1973, 1974 and 1975, in violation of 26 U.S.C. 7302, and of supplying a false withholding allowance certificate to his employer in 1974, in violation of 26 U.S.C. 7205. The district court sentenced him to a one-year term of imprisonment, to be followed by a five-year term of probation, and fined him $6,500. The court of appeals affirmed (Pet. App. 1-8).

The evidence at trial showed that during the years 1973 through 1975 petitioner was employed by the Quaker Oats Company, which issued him W-2 forms indicating wages of $30,342.88 in 1973, $23,841.79 in 1974, and $25,741.27 in 1975 (Pet. App. 2). Although petitioner was married, had only three children, and his previous annual deductions had averaged between $5,000 and $6,000, he supplied his employer in each of these years with W-2 forms on which he claimed 34 withholding allowances. As a result of these claimed allowances, no federal income taxes were withheld from petitioner's wages (Pet. App. 2-3; Tr. 467).[1]

[1] "Tr." refers to the trial transcript. "I-R." and "II-R." refers to the original record on appeal.

The evidence also showed that petitioner did not timely file his income tax returns for 1973-1975. Instead, on February 17, 1977, petitioner filed Forms 1040 for those years, upon which were set forth only the names of petitioner and his wife, petitioner's address, his filing status, three claimed exemptions, the first name of one dependent child, and two asterisks opposite each line. According to one page of a 48-page attachment, the asterisks signified that:

> Specific objection is made to this question under the Fifth Amendment, U.S. Constitution, as to Federal Reserve Notes and rights under said Amendment; and similar objection is made to the question under the First, Fourth, Seventh, Eighth, Ninth, Tenth, Thirteenth, Fourteenth, and Sixteenth Amendments.

The attachment also contained several other items, none of which provided any information with regard to petitioner's or his wife's income or from which the amount of such income could be determined (Pet. App. 3-4).

ARGUMENT

1. Petitioner contends (Pet. 5-7) that the prosecution's introduction of the Forms 1040 that petitioner submitted in 1977 for the years 1973-1975 violated his Fifth Amendment privilege against compulsory self-incrimination. In support of this argument, petitioner relies on *Garner* v. *United States*, 424 U.S. 648 (1976). But petitioner did not object to the introduction of these forms during the trial. To the contrary, petitioner's counsel stated that there would be a "continuing objection relative to documents *other than* relating to 1973, 1974 and 1975" (Tr. 178) (emphasis supplied). Since petitioner did not object to the introduction of these forms, he may not now challenge their admission unless

there was "plain error" which "affected the substantial rights of the accused and if uncorrected would be an affront to the integrity and reputation of judicial proceedings." *United States* v. *Kopel*, 552 F. 2d 1265, 1274 (7th Cir.), cert. denied, 434 U.S. 970 (1977); Rule 52(b), Fed. R. Crim. P. Here, the admission of the Forms 1040 into evidence was entirely proper.

The Fifth Amendment forbids the prosecution from using against an accused the fact that he has invoked his privilege against self-incrimination. *Griffin* v. *California*, 380 U.S. 609 (1965). But the privilege can only be validly invoked where the individual claiming it has reasonable cause to apprehend danger of incrimination from a direct answer. *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951). Thus, if the privilege has not been validly invoked, no constitutional violation results if the jury is made aware of an attempted invocation of the privilege. See *United States* v. *Gomez-Rojas*, 507 F. 2d 1213, 1220 (5th Cir.), cert. denied, 423 U.S. 826 (1975); cf. *Newhouse* v. *Misterly*, 415 F. 2d 514, 518 (9th Cir. 1969), cert. denied, 397 U.S. 966 (1970).

Here, the evidence established that petitioner had invoked the privilege against self-incrimination on the Forms 1040 he filed on February 17, 1977, not because he feared incrimination as a result of supplying information on those forms, but because he was generally opposed to the taxing system.[2] When Internal Revenue agents asked petitioner on May 3, 1976, whether he was required to file a tax return, petitioner did not assert that he could be incriminated by supplying the information requested on a

[2]Actually, it is not entirely clear that petitioner was even referring to his privilege against compelled self-incrimination. The forms contain objections on the ground of the "Fifth Amendment," as well as a veritable barrage of other constitutional amendments.

Form 1040. Instead, he stated that he had no income because Federal Reserve Notes are not money, and he was therefore not required to file tax returns (Tr. 302, 307-309). Indeed, when questioned by his standby counsel during his direct testimony, petitioner stated that he had not filed the returns in question because he believed that he "had not received the required minimum number of dollars that would subject * * * [him] to sending in a return" (Tr. 381-382).

Since petitioner did not validly invoke the privilege on the Forms 1040, the introduction of those forms in evidence against him did not violate the Fifth Amendment. *Garner* v. *United States*, *supra*, upon which petitioner relies, does not support his claim. It recognizes that a person may exercise his Fifth Amendment privilege against compulsory self-incrimination on a tax return only insofar as the claim of privilege is valid (424 U.S. at 662-663).

2. Petitioner further argues (Pet. 7-13) that the trial and the Internal Revenue Service's investigation of his tax liability violated his "procedural due process rights."

a. At trial, petitioner moved for a continuance on the ground that there was an irreconcilable difference in trial strategy between himself and his appointed counsel. He urges (Pet. 7-8) that the trial court's denial of this motion "resulted in there being no consistent defense theory." However, the record shows (Tr. 23, 39-40) that the trial court permitted petitioner to represent himself with the assistance of standby counsel and that this arrangement satisfied petitioner. There were accordingly no difficulties involving trial strategy.[3]

[3]Contrary to petitioner's claim (Pet. 8, note 7), there is no Sixth Amendment right to be assisted by a nonlawyer. *United States* v. *Benson*, 592 F. 2d 257, 258 (5th Cir. 1979); *United States* v. *Young*,

Petitioner suggests (Pet. 8) that because the trial court had previous experience with a "tax protester case" and "had a great deal of pre-trial contact with * * * [petitioner] in which there had been arguments on a multitude of legal issues," it unfairly assisted the prosecution. He also contends (Pet. 8) that the trial court "acted as a government advocate in arguing law, *sua sponte*."

But petitioner never raised these points during the trial and may not now urge them unless there was such "plain error" so as to warrant reversal. *United States* v. *Hicks*, 420 F. 2d 814, 817 (5th Cir. 1970); Rule 52(b), Fed. R. Crim. P. The record does not show any pre-trial contact between the trial court and petitioner which may have prejudiced petitioner's case. Moreover, the trial court's experience with a previous "tax protester case" only served to facilitate its understanding of the issues and did not constitute prejudicial assistance to the prosecution (Tr. 213-214).[4]

Petitioner further states (Pet. 8) that because "[t]here was no exclusion of witnesses and two IRS agents, who would later testify, were permitted to attend the entire

578 F. 2d 216, 217 (8th Cir. 1978); *United States* v. *Bertolini*, 576 F. 2d 1133 (5th Cir. 1978); *United States* v. *Taylor*, 569 F. 2d 448, 450-451 (7th Cir.), cert. denied, 435 U.S. 952 (1978).

[4]Petitioner further challenges (Pet. 8) the trial court's expressions of "its 'misunderstandings' about his defense on a number of occasions in front of, as well as outside the presence of, the jury." However, petitioner likewise never objected to these remarks at trial, and cannot object to them now unless they constitute plain error. *Singer* v. *United States*, 326 F. 2d 132, 134 (9th Cir. 1964); Rule 52(b), Fed. R. Crim. P. The alleged expressions of " 'misunderstandings' " by the trial court (Tr. 13, 65, 66, 68, 211) were actually efforts at clarification to provide better understanding of points made by defense counsel. These efforts aided rather than impeded the conduct of petitioner's case.

trial," the effect on his case "must have been devastating." He does not identify the witnesses to whom he refers. In any event, petitioner failed to request the trial court to order the exclusion of any witnesses, as Fed. R. Evid. 615 requires. Moreover, petitioner has not shown that the IRS agents did not qualify under the exception to the rule for "an officer or employee of a party which is not a natural person designated as its representative by its attorney." *In re United States*, 584 F. 2d 666, 667 (5th Cir. 1978). Finally, petitioner has shown no prejudice resulting from the presence of any witnesses during the trial.[5]

b. Petitioner further argues (Pet. 9) that evidence concerning his income obtained by the Internal Revenue Service through the use of an Internal Revenue summons should have been suppressed because a grand jury investigation was already in progress. But as the court of appeals correctly noted (Pet. App. 6), "[t]he record does not show if and when an IRS summons was used and, if used, whether a grand jury investigation was then in progress." Moreover, even assuming that petitioner has standing to seek suppression of evidence obtained from a third party (see *United States* v. *Miller*, 425 U.S. 435 (1976); *United States* v. *Genser*, 582 F. 2d 292, 304-305 (3d Cir. 1978), after remand, 595 F. 2d 146, aff'd after remand, 602 F. 2d 69, cert. denied, No. 79-249, Oct. 29, 1979), and further assuming that summonses were issued while a grand jury investigation was in progress, petitioner did not show that any summons was issued after the Internal Revenue Service recommended to the

[5]Petitioner also argues (Pet. 9) that he was "constantly maneuvered and intimidated into providing his 'defense' *in advance* of his case in chief" (emphasis in original). But in the two instances cited by petitioner (Tr. 55, 73-74), the trial court simply assisted petitioner, who insisted on representing himself, in making his opening statement.

Department of Justice that a criminal prosecution be undertaken or that the Internal Revenue Service used the summons authority solely for criminal purposes without the existence of a valid civil tax determination or collection purpose. See *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978). [6] In these circumstances, the trial court properly refused to suppress the evidence obtained by the Internal Revenue Service.

c. Petitioner also asserts (Pet. 9-10) that he was convicted of being a "bad" man, *i.e.*, one who contributes to defense funds of other tax protesters, a false "Reverend", and the creator of his own religion. But the jury was not told that petitioner contributed funds to tax protesters or that petitioner was a "false 'Reverend' " or the creator of his own religion (see Tr. 387 395-397). At all events, in light of the overwhelming evidence of petitioner's guilt, any error in the trial court's characterizations was plainly harmless.

Petitioner further contends (Pet. 10) that the prosecution's production of material from his civil audit file (Tr. 290-291) during the trial "should have resulted in an immediate mistrial" because it should have been produced prior to trial under Rule 16(a)(1)(C), Fed. R. Crim. P. But petitioner did not object to the production of this material during the trial. At all events, petitioner

[6]Petitioner states (Pet. 9) that the "specter of the use of illegally obtained wiretap evidence still beclouds this case [because] * * * [t]he government never filed the affidavits they had promised to file stating that there had been no wiretapping." In its Response to Defendant's Multiple PreTrial Motions, the government denied that there had been any electronic surveillance of petitioner (I-R., Doc. 26, at 3). The trial court apparently found this statement sufficient and dispensed with the need for affidavits when it denied petitioner's Motion to Dismiss (II-R., Doc. 1, at 2).

did receive the material and has not shown how he was prejudiced by its arguably late production. See *United States* v. *Miller*, 529 F. 2d 1125, 1128 (9th Cir.), cert. denied, 426 U.S. 924 (1976).[7]

d. Petitioner also argues (Pet. 10-11) that the trial court improperly allowed introduction of evidence of his prior and subsequent conduct with respect to the filing of returns. This evidence supported a finding that petitioner knew that he was required to file returns and that, therefore, when he failed to file them, he did so willfully. It is well settled that the use of such evidence is entirely proper. *United States* v. *Farris*, 517 F. 2d 226, 229 (7th Cir.), cert. denied, 423 U.S. 892 (1975); *United States* v. *McCabe*, 416 F. 2d 957, 958 (7th Cir. 1969); Rule 404(b), Fed. R. Evid.

e. Petitioner contends (Pet. 11-12) that the court erred in giving the following instruction (Tr. 491):

> A defendant who wishes to testify is a competent witness and his testimony should not be disbelieved merely because he is a defendant. However, in weighing his testimony, the jury should consider the fact that the defendant has a vital interest in the outcome of his trial.

It is well settled that such an instruction concerning the credibility of a defendant's testimony is correct. See

[7]Petitioner also alleges (Pet. 10) that "[i]n his argument, the prosecutor inflamed the jury into believing that the entire 'voluntary' tax system would collapse if Stout were not found guilty." The record, however, does not contain such a statement by the prosecution. (See Tr. 459-469, 482-485.)

Reagan v. *United States*, 157 U.S. 301, 305 (1895); *United States* v. *Crovedi*, 467 F. 2d 1032, 1035-1036 (7th Cir. 1972), cert. denied, 410 U.S. 990 (1973).[8]

3. Finally, petitoner contends (Pet. 13-19) that he was the victim of improper selective prosecution by the Internal Revenue Service. In order to establish a claim of selective prosecution, the defendant must show that others similarly situated generally have not been prosecuted, and that the government's prosecution of him is impermissibly selective, invidious, in bad faith or based on impermissible considerations such as race, religion, or his exercise of constitutional rights. *United States* v. *Kahl*, 583 F. 2d 1351 (5th Cir. 1978).

Here, unlike *United States* v. *Falk*, 479 F. 2d 616 (7th Cir. 1973), upon which petitioner relies (Pet. 15, 18), petitioner did not prove that the government failed to prosecute persons it knew had violated the filing laws. All that he showed was that his activity may have attracted attention to the fact that he was likely to be violating the tax laws, which violations the government prosecutes to the extent that it has knowledge of them and to the extent of its physical capabilities to prosecute the volume of cases presented. The same showings in similar cases have uniformly resulted in rejections of claims of selective prosecution. See, *e.g.*, *United States* v. *Berrios*, 501 F. 2d 1207, 1211 (2d Cir. 1974); *United States* v. *Swanson*, 509 F. 2d 1205, 1208-1209 (8th Cir. 1975); *United States* v. *Scott*, 521 F. 2d 1188, 1195 (9th Cir. 1975), cert. denied,

---

[8]Petitioner also urges (Pet. 13) that "his dramatic increase in withholding 'allowances' was surely a political protest protected by the First Amendment from criminal prosecution, as a matter of law." However, such violations of the law are not protected by the First Amendment. *United States* v. *Malinowski*, 472 F. 2d 850 (3d Cir.), cert. denied, 411 U.S. 970 (1973).

424 U.S. 955 (1976). The court of appeals therefore correctly held (Pet. App. 4-5) that petitioner was not the victim of improper selective prosecution.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

ROBERT E. LINDSAY
JAMES F. MILLER
Attorneys

NOVEMBER 1979

DOJ-1979-11